

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DAVID SCOTT HARRISON,
CDC # E-62612,

Civil No. 06cv2470-RLH

Plaintiff,
vs.

ORDER GRANTING PLAINTIFF'S MOTION TO FILE A LATE APPEAL

BONNIE DUMANIS,

Defendant.

On April 18, 2007, the Court granted Defendant's motion to dismiss Plaintiff's Complaint and entered judgment dismissing this action. (Doc. Nos. 17-18.) Plaintiff filed a motion for reconsideration of that Order on April 26, 2007, the date he handed the motion to prison officials for mailing to the Court.¹ (Doc. No. 20.) Defendant filed an opposition on May 10, 2007, and the Court denied the motion for reconsideration on May 14, 2007. (Doc. No. 22.) Plaintiff handed a reply brief to the prison officials for mailing to the Court on May 17, 2007, which the Court did not receive until May 21, 2007. (Doc. No. 24.) The Court accepted and considered Plaintiff's reply brief, and filed an amended order denying the motion for reconsideration on June 12, 2007. (Doc. No. 25.) On August 1, 2007, Plaintiff filed the instant Motion for Leave to File a Late Appeal, along with a Notice of Appeal, contending that he never received a copy

¹ Plaintiff is entitled to the benefit of the “mailbox rule” which provides for constructive filing of court documents as of the date they are submitted to the prison authorities for mailing to the court. *Anthony v. Cambra*, 236 F.3d 568, 574-75 (9th Cir. 2000).

1 of either order ruling on his motion for reconsideration, and was unaware that the time to appeal
 2 had expired until he received a response to his request for a status of his case from the Clerk of
 3 Court on July 24, 2007. (Doc. Nos. 26-27.) Defendant has filed an Opposition to Plaintiff's
 4 Motion. (Doc. No. 33.)

5 Defendant acknowledges that Plaintiff's April 26, 2007 motion for reconsideration was
 6 filed within ten days of entry of the April 18, 2007 judgment, and therefore tolled the time to file
 7 a notice of appeal. See Fed.R.App.P. 4(a)(4)(A)(iv). Plaintiff had 30 days from June 12, 2007,
 8 the date this Court issued its amended order denying his motion for reconsideration, to timely
 9 file a notice of appeal. See Fed.R.App.P. 4(a)(1) & 4(a)(4)(A)(iv). The last day Plaintiff could
 10 have timely filed a notice of appeal was July 12, 2007. The instant Motion and notice of appeal
 11 were constructively filed on July 27, 2007, 15 days late.

12 Fed.R.App.P. 4(a)(5) provides that the district court may extend the time to file a notice
 13 of appeal for a period of 30 days if a party so moves no later than 30 days after the time to appeal
 14 expires, and the party shows excusable neglect or good cause. See Fed.R.App.P. 4(a)(5)(A).
 15 In addition, Fed.R.App.P. 4(a)(6) provides that the district court may reopen the time to file an
 16 appeal for a period of 14 days if the Court finds that: (1) a party did not receive notice of entry
 17 of judgment within 21 days after judgment was entered; (2) the motion is filed within 180 days
 18 after the judgment is entered or within 7 days after the party received notice of entry of
 19 judgment, whichever is earlier; and (3) no party would be prejudiced. See Fed.R.App.P.
 20 4(a)(6)(A)-(C).

21 Plaintiff has declared under penalty of perjury that he did not receive a copy of this
 22 Court's May 21, 2007 order denying his motion for reconsideration or the June 12, 2007
 23 amended order denying the motion for reconsideration. (Pet.'s Mot. at 3-5.) He declares that
 24 he inquired of the Clerk of Court on or about July 15, 2007 of status of his case, and received
 25 a copy of the docket from the Clerk on July 24, 2007, at which time he became aware that his
 26 motion for reconsideration had been denied. (Id. at 4-5.)

27 Defendant correctly acknowledges that due to Plaintiff's status as a prisoner, the Court
 28 did not send him electronic notification of its filings, and that the Court docket contains entries

1 stating that a copy of the May 18, 2007 order and the June 12, 2007 amended order “will be
 2 delivered by other means” to Plaintiff at his prison mailing address. (See Doc. Nos. 22, 25.)
 3 The docket does not contain a further indication that the amended order actually was sent to
 4 Plaintiff, nor is the Court’s system designed to provide such information. The orders were filed
 5 during the time frame of the Court’s transition to a new electronic filing system, lending
 6 credence to Plaintiff’s allegation of non-receipt. Plaintiff states that the prison mail log will
 7 confirm that no incoming legal mail was logged from the date he sent his reply brief until he
 8 received a reply from the Clerk regarding his status request, and states that he was unable to
 9 procure a copy of the mail log in time to file his motion. (Pet.’s Mot. at 6 n.1.) Defendant
 10 contends that Plaintiff bears the burden of demonstrating that he did not receive notice of entry
 11 of judgment, that the Clerk’s mailing of the notice of entry of judgment raises a rebuttable
 12 presumption of receipt, and that even where Plaintiff’s declaration rebuts that presumption, the
 13 Court is required to weigh the evidence in order to make a considered factual determination
 14 concerning receipt. (Opp. at 3.)

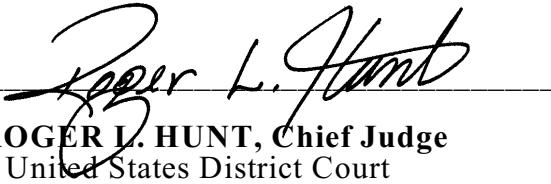
15 Plaintiff has satisfied the provisions of Fed.R.App.P. 4(a)(5). He filed the instant Motion
 16 within 30 days after expiration of time to appeal. His declaration is executed under penalty of
 17 perjury and establishes good cause and excusable neglect arising from the lack of notification
 18 of the denial of his motion for reconsideration. Defendant has come forward with no evidence
 19 that Plaintiff received timely notification, with the exception of pointing to the ambiguous
 20 notation on the Court’s docket. Defendant has not challenged Plaintiff’s sworn declaration, and
 21 has not challenged Plaintiff’s contention that the prison mail log would support his allegation,
 22 although it appears to be within the Defendant’s power to do so. Accordingly, the weight of the
 23 evidence before the Court supports Plaintiff’s contention that he did not receive notice of the
 24 denial of his motion for reconsideration. See Nunley v. City of Los Angles, 52 F.3d. 792, 796
 25 (9th Cir. 1995) (“When a movant specifically denies receipt of notice, a district judge must then
 26 weigh the evidence and make a considered factual determination concerning receipt, rather than
 27 denying the motion out of hand based on proof of mailing.”)

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1 Plaintiff has also satisfied the provisions of Fed.R.App.P. 4(a)(6). Plaintiff did not
2 receive notice that his motion for reconsideration was denied until 42 days after that denial, the
3 instant Motion was filed within 180 days after the Court denied the motion for reconsideration
4 and 3 days after Plaintiff received notice that final judgment had been entered, and Defendant
5 would suffer no prejudice as a result of reopening the time to appeal. See Fed.R.App.P.
6 4(a)(6)(A)-(C); see also Nunley, 52 F.3d at 797-98 (district court's discretion to deny Rule
7 4(a)(6) motion is limited).

8 Accordingly, the Court **GRANTS** Plaintiff's Motion pursuant to Fed.R.App.P. 4(a)(5)
9 and 4(a)(6). The Clerk is **DIRECTED** to file the Notice of Appeal submitted by Plaintiff (Doc.
10 No. 27) nunc pro tunc to July 27, 2007, and to treat it as a timely Notice of Appeal.

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12 DATED: September 14, 2007


13 ROGER L. HUNT, Chief Judge
United States District Court

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